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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-729

ARROW FOOD DISTRIBUTORS, INC.,
Petitioner,

vs.

LLOYD F. LOVE, CONSERVATOR OF THE ESTATE OF WILLIAM F. RILEY, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 3

Statement of the Case 3

I. The Application in State Court, After Remand From Federal Court, of Mississippi's "Special Appearance" Rule Barring a Defendant, Who First Properly Challenged in Personam Jurisdiction Under Rule 12, F.R.C.P. in Federal Court, From Thereafter Challenging in Personam Jurisdiction in the State Courts of Mississippi Violates Due Process in That (1) It Substantially Burdens the Assertion of Federal Rights in State Court; (2) It Is Wholly Unfair; and (3) It Amounts to an Unconstitutional Exercise of Supervisory Jurisdiction by a State Court Over a Federal Court 5

II. The Attachment of $3,500 of Accounts Receivable of the Petitioner Arrow, a Non-Resident of the State of Mississippi, Was Insufficient, Under *Shaffer*, to Vest in Personam Jurisdiction in the Courts of Mississippi 11

III. Mississippi's Prejudgment Attachment Statutes, Section 11-31-1, Mississippi Code of 1972, Violate Due Process As Applied to This Petitioner in That the Writs of Attachment Initiating This Suit Were Obtained Without Notice, Without Bond, or Without Hearing 13

IV. The Assumption of in Personam Jurisdiction Over the Defendant Violates Due Process in That the Cause of Action Arose Outside Mississippi and the Defendant Was Not Engaged in Continuous and Substantial Activity in Mississippi 16

Conclusion 17

Appendix "A"—Decision of the Supreme Court of Mississippi A1

Table of Authorities

Cases

American Railway Express v. *Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L.Ed. 140 (1923) 6

Arrow Food Distributors, Inc. v. *Love*, 361 So.2d 324 (Miss. S.Ct. 1978) 1, 4, 5, 6, 14

Brinkerhoff-Faris Company v. *Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed. 1107 (1930) 10

Brown v. *Western Railway of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949) 6

Burton v. *U. S.*, 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482 (1905) 11

Creswill v. *Grand Lodge Knights of Pythias*, 225 U.S. 246, 32 S.Ct. 822, 56 L.Ed. 1074 (1912) 6

Daniels v. *Allen*, 344 U.S. 443, 73 S.Ct. 392, 97 L.Ed. 1366 (1953) 10

Davis, Director General of Railroads, etc. v. *Wechsler*, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143 (1923) 6, 7, 9, 10

Ellis v. *Dixon*, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955) 6

Employers' Reinsurance Corporation v. *Bryant*, 299 U.S. 374, 57 S.Ct. 273, 81 L.Ed. 289 (1936) 7

Fuentes v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) 14

Henry v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L. Ed.2d 408 (1965) 8, 10

International Shoe Co. v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) 13, 16-17

Lathrop v. *Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961) 6

McCoy v. *Watson*, 154 Miss. 307, 122 So. 368 (1929) 9

McMillan v. *Tate*, 260 So.2d 832 (1972) 9

Mississippi Chemical Corporation v. *Chemical Construction Corporation*, 444 F.Supp. 925 (U.S.D.C., S.D. Miss. 1977) 14, 15

Mitchell v. *W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974) 14

Mladinich v. *Kohn*, 250 Miss. 497, 175 So.2d 785 (1964) 9

Murdock v. *City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875) 10

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975) 14

Perkins v. *Benguet Consolidated Mining Company*, 342 U.S. 437 (1952) 17

Rogers v. *Alabama*, 192 U.S. 226, 24 S.Ct. 257, 48 L.Ed. 417 (1904) 10

St. Louis Southwestern Railroad Company v. *Alexander*, 227 U.S. 218 (1913) 17

Shaffer v. *Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977) 2, 4, 11, 12, 13

Tauza v. *Susquehanna Coal Company*, 220 N.Y. 259, 115 N.E. 195 (1917) 17

Turner v. *Williams*, 162 Miss. 258, 139 So. 606 (1932) 9

Ward v. *Love County*, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920) 6

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—
Fifth Amendment 3
Fourteenth Amendment 3
Mississippi Code of 1972, Annotated—
Section 11-31-1 et seq. 3, 14
Section 11-31-3 14
Section 79-1-27 ..... 3, 4, 16
Rule 12, Federal Rules of Civil Procedure 2, 9
28 U.S.C., Section 1257(3) 2

TEXTS

2A *Moore's Federal Practice*, para. 12.12 ..... 9, 10
Restatement 2d, *Conflicts of Laws*, Section 47(2) 13

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The Petitioner, Arrow Food Distributors, Inc., respectfully prays that a Writ of Certiorari issue to review the July 12, 1978, Judgment and Opinion of the Supreme Court of Mississippi, wherein a $248,920 judgment against the Petitioner was affirmed.

OPINION BELOW

The decision of the Supreme Court of Mississippi is reported at 361 So.2d 324 (Miss. S.Ct. 1978). It appears as an appendix hereto as Appendix "A". A timely Petition for Rehearing before the Supreme Court of Mississippi was filed and denied on August 23, 1978. Thereafter the Petitioner timely filed an application for a stay of the mandate of the Supreme Court of Mississippi to pursue this Writ of Certiorari. The application for stay was denied on September 15, 1978.

Petitioner is contemporaneously herewith filing an application to this Court to stay the mandate of the Mississippi Supreme Court pending disposition of this Petition for Certiorari. Presently, the final mandate of the Supreme Court of Mississippi has not issued, pending payment of the costs and issuance of notice of forfeiture to the supersedeas bondsman. However, these steps are imminent and Petitioner respectfully prays that the companion motion for a stay be granted to preserve and save the subject matter of this appeal. No further effectual relief by way of stay exists in the Supreme Court of Mississippi, since this Petitioner's application for a stay in that Court has been denied.

JURISDICTION

The final order of the Supreme Court of Mississippi denying the Petition for Rehearing was entered on September 15, 1978. This Petition for Certiorari was ruled within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether in a civil case first removed from State Court to United States District Court and then remanded after answer, a State Court may preclude the defendant from challenging jurisdiction over his person because that defendant failed to file a "special appearance" in Federal Court even though Federal Court pleadings properly challenged jurisdiction over defendant's person under Rule 12, F.R.C.P.

2. Whether, in a suit jurisdictionally initiated by attachment of the "effects" of a non-resident, there was jurisdiction over the person of the defendant under *Shaffer* v. *Heitner*.

3. Whether, as applied to the Petitioner, Arrow Foods, in this case, Mississippi's attachment statutes, Section 11-31-1, Mississippi Code of 1972, Annotated, et seq., are unconstitutional because they authorize a pre-judgment attachment of Arrow's "effects" without notice, bond, or a hearing.

4. Whether Section 79-1-27, Mississippi Code of 1972, Annotated, conferring jurisdiction of suits against foreign corporations may constitutionally be applied to Petitioner, Arrow Foods, where the subject suit arose outside the State of Mississippi, the Petitioner Arrow was not engaged in continuous and substantial activity in Mississippi, and the suit did not arise out of such activity.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are:

The Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

The Respondent, Lloyd F. Love, Conservator, filed this suit for $2,917,000 for his ward's personal injuries in the Chancery Court of Adams County, Mississippi. Writs of non-resident attachment were sued out against local defendants who allegedly held "effects" of the Petitioner, Arrow Food Distributors, a non-resident corporation.

Before answer, appearance, or any pleading whatever the Petitioner, Arrow, removed the cause under 28 U.S.C. Section 1441 to the United States District Court for the Southern District of Mississippi. After removal, and pending a hearing on the removal petition, Petitioner, Arrow, first answered the complaint. In separate conspicuous de-

fenses included in its federal court answer, Arrow questioned jurisdiction over its person, over the subject matter, and moved to quash the non-resident attachment on due process grounds.

After hearing, the cause was remanded to the Chancery Court of Adams County, Mississippi. As the opinion below recites, "The pleadings transferred to the Chancery Court included Arrow's answer which asserted Thirteen defenses." *Arrow Food Distributors, Inc.* v. *Love, supra,* p. 326. The Chancery Court of Adams County, Mississippi, overruled the pleas to jurisdiction. After trial to a jury, the Court entered judgment upon the jury's verdict in the amount of $248,920.00. The defendant, Arrow, appealed to the Supreme Court of Mississippi. The appeal was almost wholly comprised of jurisdictional objections coextensive with issues two through four of this petition.

Inter alia, Arrow asserted on appeal that the attachment was void under the teachings of *Shaffer* v. *Heitner,* 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), that Arrow was a non-resident corporation which had no substantial minimal contacts with the State of Mississippi, that the attachment was void *ab initio,* having been begun without hearing, notice or bond, and finally that Arrow could not be sued in Mississippi on a cause of action arising in Louisiana under Section 79-1-27, Mississippi Code of 1972, consistent with due process, unless Arrow had continuous and substantial activity in Mississippi.

The opinion of the Supreme Court of Mississippi pretermitted any consideration of the jurisdictional issues. The avoidance of the jurisdictional issues was rested upon procedural grounds:

> We note that Arrow filed an answer and asserted thirteen defenses in a full trial of this cause. By entering a general appearance, Arrow waived any asserted defect in the jurisdiction. *Maupin* v. *Dennis,* 252 Miss. 497, 175 So.2d 130 (1965); *Mladinich* v. *Kohn,* 250 Miss. 138, 164 So.2d 785 (1964).
>
> In *McMillan* v. *Tate,* 260 So.2d 832 (Miss. 1972), this Court said:
>
> > While an individual or corporation may appear specially for the purpose of objecting to the jurisdiction of the court over his person, *he must do so before filing any other pleadings.* 260 So.2d at 833 [emphasis by the Supreme Court of Mississippi]. *Love, supra,* at 327.
>
> Hence the appeal to this Court.

I. The Application in State Court, After Remand From Federal Court, of Mississippi's "Special Appearance" Rule Barring a Defendant, Who First Properly Challenged in Personam Jurisdiction Under Rule 12, F.R.C.P. in Federal Court, From Thereafter Challenging in Personam Jurisdiction in the State Courts of Mississippi Violates Due Process in That (1) It Substantially Burdens the Assertion of Federal Rights in State Court; (2) It Is Wholly Unfair; and (3) It Amounts to an Unconstitutional Exercise of Supervisory Jurisdiction by a State Court Over a Federal Court.

As this Court has aptly remarked, "Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and the evidence." The right and opportunity to challenge jurisdiction on federal constitutional bases is sacred. In State Court, "the assertion of federal rights, when plainly and reasonably made, is not to be defeated

under the name of local practice." *Davis, Director General of Railroads, etc.* v. *Wechsler,* 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143 (1923). Local rules of pleading clearly and unexceptionally cannot defeat "a plain assertion of federal right." *Ward* v. *Love County,* 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751 (1920); *Creswill* v. *Grand Lodge Knights of Pythias,* 225 U.S. 246, 32 S.Ct. 822, 56 L.Ed. 1074 (1912); *American Railway Express* v. *Levee,* 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140 (1923); *Brown* v. *Western Railway of Alabama,* 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100 (1949); *Ellis* v. *Dixon,* 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231 (1955); *Lathrop* v. *Donohue,* 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).

The "local" rule invoked to bar Arrow's defenses bore no relationship to local state practice or state concerns. The answer filed by Petitioner Arrow said to be the basis for "waiver" of the right to contest jurisdiction was filed in Federal Court after removal. *Love, supra,* 361 So.2d 324 at 326, 327. No answer had been filed in State Court before removal. It is *ultra vires* for a State Supreme Court to exert supervisory power over federal court pleadings or to invoke doctrines of waiver, estoppel or default thereupon. The holding of the Supreme Court of Mississippi, cutting off Petitioner Arrow's right to contest jurisdiction, plainly encumbers the right to make constitutional defenses in state court. There is no more unreasonable obstacle to raising federal rights than to impose a waiver or forfeiture upon a litigant in state court for what he properly did in federal court.

The use of a local procedural rule to thwart the exercise of Federal rights has been prohibited by this Court since *Davis, Director* v. *Wechsler, supra,* and progeny. The paucity of cases reaching this Court since 1923 attests to the fact that *Davis* is understood and applied.

That a state Court should transgress the teachings of *Davis,* even if on arguable grounds, is highly unusual. Initially the Mississippi special appearance rule could not have applied in this case since the case was removed before any answer, appearance, or any hearing in State Court. While this Court possesses supervisory power over the inferior Federal courts, *Employers' Reinsurance Corporation* v. *Bryant,* 299 U.S. 374, 57 S.Ct. 273, 81 L.Ed. 289 (1936), the absence of any supervisory power by a State Court over the procedures of a Federal Court, coextensive in jurisdiction, is too clear for citation or comment. Therefore, the procedural ruling of the Supreme Court of Mississippi here is a double insult to the Federal system. It clearly burdens the assertion of constitutional rights and does so by meddlesome interference in the Federal Court system.

Davis v. *Wechsler, supra,* directly controls this case and commands a reversal of the case at bar. In *Davis,* the defendant was attempting, by appropriate pleas, to claim under the Federal Transportation Act of 1920 that the suit against him was brought in an improper forum. The effort to claim this federal right was squelched by the Missouri State Court of Appeals. That court held that the federal statute involved was a venue statute and not a jurisdictional statute. Therefore, under state law, venue was waived by the appearance of the defendant. Earlier, the defendant had answered and had pled jurisdiction but not venue. The decision in *Davis* turned, then, on the fact that the defendant there was claiming the suit was in the wrong county, but had mislabeled his plea, according to state practice.

Clearly, the defendant in *Davis* was claiming a valuable federal right, and not one created by Missouri law. The State court defeated that claim based upon procedural

characterizations of the proper factual and legal plea. In its response to the situation, this Court ruled:

> Whatever springs the state may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . Indeed, when the state requires him to unite his defense on the merits, which imports an appearance pro hac vice, with his preliminary plea, it is hard to understand how any affect could be attributed to the statement that he appeared. The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principle is general and necessary. Ward v. Love County, 253 U.S. 17, 22. If the constitution and laws of the United States are to be enforced, this court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds. Creswill v. Grand Lodge Knights of Pythias, 225 U.S. 246. This is familiar as to the substantive law and for the same reasons it is necessary to see that local practice shall be allowed to put unreasonable obstacles in the way. See American Railway Express v. Levee, decided this day, ante, 19.

The decision below unreasonably burdens the assertion of federal constitutional rights in the state system, demonstrates an unwarranted supervisory jurisdiction by state court over federal courts, and finally was not fairly applied to this case.

In *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408, in a criminal context, this Court announced

that a state procedural rule could not bar a federal constitutional claim unless the rule was reasonable and had been fairly applied. The unreasonableness of the rule is amply shown by *Davis*. However, assuming arguendo, that a state may for a pure local idiosyncrasy require that a pleading challenging jurisdiction be labeled "Special Appearance", the state, it may be shown, has not fairly applied this rule to the present litigants. To contest jurisdiction in Mississippi, a corporation must "appear specially for the purpose of objecting to the jurisdiction of the court over his person" before filing any other pleadings. *McMillan* v. *Tate*, 260 So.2d 832 (1972). However, it has long been an exception to that rule that the filing of a petition for removal does not constitute a general appearance. *McCoy* v. *Watson*, 154 Miss. 307, 122 So. 368 (1929). The *McCoy* exception is carried forward and approved in *Mladinich* v. *Kohn*, 250 Miss. 497, 175 So.2d 785 (1964). Citing with approval an older case, *Turner* v. *Williams*, 162 Miss. 258, 139 So. 606 (1932), the *Mladinich* court observed, as regards removal, that the non-resident does not submit himself to the state court by availing himself of the right of removal to federal court. *Mladinich, supra* at 793.

Since the pleadings said to offend the Mississippi "special appearance" rule were filed after removal to Federal court, no reasonable construction of a waiver can be applied to such pleadings. If it does not infringe the Mississippi special appearance rule to file a petition for removal as the cases concede, then proper and appropriate steps taken to contest jurisdiction in federal court before remand similarly could not be a waiver. Since special appearances are unknown and unnecessary in federal court, 2A *Moore's Federal Practice*, paragraph 12.12, pp. 2324-2325, the proper perfection of jurisdictional objections by pleading those defenses under Rule 12 in the first respon-

sive pleading, as was unquestionably done here, is all that a removing defendant need do. *Id.* at 2320.

Since the decision below turns upon a procedural ground cutting off asserted federal constitutional rights, no other ground in the Mississippi Supreme Court's decision can insulate this case from this Court's review. The principle that this court will not review state court judgments resting on independent and adequate state grounds, *Murdock* v. *City of Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875), principally relates to substantive grounds. Where as here, a state procedural rule has precluded consideration of a federal question, a federal question is always presented. *Henry* v. *Mississippi*, 379 U.S. 443, 446-447, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). The adequate state ground principle has no application when federal rights are rejected on the basis of procedural technicalities. *Davis* v. *Wechsler, supra*, at 24-25; *Daniels* v. *Allen*, 344 U.S. 443, 73 S.Ct. 392, 97 L.Ed. 1366 (1953); *Brinkerhoff-Faris Company* v. *Hill*, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); *Rogers* v. *Alabama*, 192 U.S. 226, 230-231, 24 S.Ct. 257, 48 L.Ed. 417 (1904). *Davis, supra*, forthrightly holds that a state's adherence to its own procedural rules cannot constitute an independent and adequate state ground requiring affirmance.

The existence of an unwarranted procedural default below is unmistakable. The rule has prevented the defendant from raising serious and substantial constitutional questions concerning jurisdiction over its person. Since the petitioner verily believes for the foregoing reasons that its petition is well taken and should be granted, petitioner will address here the scope of the relief.

First, this Court could vacate the decision of the Mississippi Supreme Court and remand the case to that Court

with directions to consider the constitutional questions raised about jurisdiction. This course would avoid anticipation of a question of constitutional law in advance of the necessity of deciding it. *Burton* v. *U. S.*, 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482 (1905). Moreover, the Mississippi Supreme Court arguably should be given an opportunity to meet the constitutional questions raised.

The great likelihood is that this court, upon grant of the petition for certiorari, would vacate and remand to the Supreme Court of Mississippi, postponing a decision on the federal constitutional questions raised. However, since there is jurisdiction in this court to hear and finally decide the constitutional questions raised, they are set out hereafter. Should the court prefer to abstain from deciding these questions, the bounds and substance of the constitutional questions raised will further substantiate petitioner's contention that the procedural rule invoked against it foreclosed substantial constitutional claims.

II. The Attachment of $3,500 of Accounts Receivable of the Petitioner Arrow, a Non-Resident of the State of Mississippi, Was Insufficient, Under *Shaffer*, to Vest in Personam Jurisdiction in the Courts of Mississippi.

Under *Shaffer* v. *Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977), Mississippi lacked in personam jurisdiction over petitioner Arrow Food Distributors, Inc., and the resulting exercise of jurisdiction by attachment over Arrow was unconstitutional. *Shaffer* recognizes that the happenstance existence of property or choses in action in a given state is not sufficient to vest jurisdiction there over all controversies between the parties. To do this is to "allow state court jurisdiction that is fundamentally unfair to the defendant", *Shaffer, supra*.

Here, a personal injury suit arising in Louisiana was filed for $2,917,000 in Mississippi. The sole jurisdictional vehicle was the attachment of $3,500 in open accounts. The natural, logical and practical jurisdictional situs for this personal injury suit was the State of Louisiana. The accident occurred there. The petitioner Arrow has its principal place of business there. The liability witnesses and contemporaneous medical evidence were there. To this day, a "protective" lawsuit remains on file in West Feliciana Parish, Louisiana.

A square application of the *Shaffer* jurisdictional tests deprives the Mississippi courts of jurisdiction. The property attached, accounts receivable for food stuffs, is wholly unrelated to the cause of action, a tort suit between a Louisiana conservator and a Louisiana-based Delaware corporation, arising wholly within Louisiana. Nor are there compelling ties among the petitioner Arrow, the State of Mississippi, and the underlying litigation. The presence of $3,500 in accounts receivable in Mississippi is not strongly suggestive that the petitioner Arrow had any significant contacts with Mississippi. The use of one truck, one driver, and one load of groceries per week in five counties of a state, is not a sufficient contact. Similarly, the complainant in this state court suit was not perfecting a claim to the attached property. This suit is purely and clearly the type of *Harris* v. *Balk* attachment which this Court in *Shaffer* stated would be significantly changed:

> For the type of quasi in rem action typified by Harris v. Balk and the present case, . . . [this case] would result in significant change. These are cases where the property which now serves as the basis for state court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a state might suggest the existence of other ties among the defendant, the state and the litigation, the presence of the property alone would not support the state's jurisdiction. If those other ties did not exist, cases over which the state is now thought to have jurisdiction could not be brought in that forum. *Id.* at 433 U.S.

Shaffer holds that all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* v. *Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and its progeny. As to causes of action arising outside the forum state, *International Shoe* holds that a non-resident corporation may not be sued, consistent with due process, unless it is engaged in continuous and substantial activity. Suits arising outside of the forum state brought against non-resident corporations, as here, may not be brought under *International Shoe* unless the activities of the defendant in the forum state are connected with the cause of action and the defendant's activities are continuing and substantial. This caveat on out of state causes of action is embodied in the Restatement 2d, *Conflicts of Laws*, Section 47(2). Clearly, the contact of Arrow in Mississippi falls short of those minimum contacts necessary to vest jurisdiction under *International Shoe* v. *Washington* and *Shaffer* v. *Heitner*.

III. Mississippi's Prejudgment Attachment Statutes, Section 11-31-1, Mississippi Code of 1972, Violate Due Process As Applied to This Petitioner in That the Writs of Attachment Initiating This Suit Were Obtained Without Notice, Without Bond, or Without Hearing.

This suit was begun by the respondent, Love, upon the filing of a bill of complaint requesting writs of attach-

ment against four local defendants. According to the opinion of the Mississippi Supreme Court below, *Love, supra*, at 326, the attachments tied up approximately $3,500 in accounts for foodstuffs. Without notice, bond, or a subsequent hearing on the attachment, the attachment, under Mississippi law is "sufficient to bind such effects or indebtedness. . ." Section 11-31-3. The plaintiff made no showing, by affidavit or otherwise, of his entitlement to the monies attached. No bond is authorized or required by Mississippi statutes, Section 11-31-1, et seq. No security by bond or otherwise is authorized or was required of the respondent in this case. Petitioner Arrow has no prerogative under the subject statutes to recover damages, interest or attorney's fees if the attachments are wrongful.

That such procedures constitute a deprivation of property without due process of law is inferable from this Court's recent decisions. *Fuentes* v. *Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

For present purposes, further citation supporting the invalidity of Mississippi's attachment in Chancery statutes is unnecessary. Recently, the United States District Court for the Southern District of Mississippi declared those statutes unconstitutional on the bases alleged here. *Mississippi Chemical Corporation* v. *Chemical Construction Corporation*, 444 F.Supp. 925 (U.S.D.C., S.D. Miss. 1977). The reasons which underlay that decision parallel and overlap the grounds urged here:

> . . . This Court is of the opinion that the Mississippi attachment in Chancery statutes are unconstitutional because they do not require the plaintiff to obtain any Court ordered writ of sequestration or garnishment, the obligation of the attachment defendant to the non-resident principal defendant being bound by the service of process made at the sole instance and discretion of the plaintiff's attorney; no bond is required of the plaintiff nor is there any requirement that the plaintiff show, by affidavit or otherwise, that he is in any way entitled to the attachment; there is no review, either prior to or after service upon the attachment defendant of the propriety of the attachment by a disinterested, neutral judicial officer; the principal defendant can dissolve the attachment only by posting a satisfactory bond, and no procedure exists whereby the principal defendant can challenge the validity of the attachment on the grounds of procedural irregularity, excessiveness of the attachment, lack of merit of the underlying claim, or any other reason; only by prevailing at trial on the merits can the principal defendant obtain relief from the attached indebtedness; all debts owing to the principal defendant are subject to attachment regardless of where the debts arose, provided only that the attachment defendant be served within the state of Mississippi; and finally the statutes do not require even a rudimentary ex parte hearing. *Id.* at 938.

The flimsy procedural default relied upon by the Mississippi Supreme Court foreclosed and submerged consideration of this viable constitutional issue. Indeed, the opinion in *Mississippi Chemical Corporation* would and should be persuasive upon the Mississippi Supreme Court if these constitutional defenses may be finally heard.

IV. The Assumption of in Personam Jurisdiction Over the Defendant Violates Due Process in That the Cause of Action Arose Outside Mississippi and the Defendant Was Not Engaged in Continuous and Substantial Activity in Mississippi.

The petitioner Arrow conducted route sales of foodstuffs in five of Mississippi's eighty-two counties, utilizing one salesman and one delivery truck. The orders were filled in Louisiana and shipped by truck to Mississippi. The Mississippi area serviced was that portion of southwest Mississippi nearest Baton Rouge, Louisiana. At best, the average of weekly shipments in the ninety days before suit was filed was $2,000 to $3,000 per week. At the time suit was filed, Arrow's Mississippi customers owed it $3,186.06. The accident giving rise to this suit occurred within the State of Louisiana.

The claim of jurisdiction over the petitioner, Arrow Food Distributors, Inc., in Mississippi, rests upon Section 79-1-27, Mississippi Code of 1972:

> Any corporation claiming existence under the laws of any other state or any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of an action accrued in this state or not.

The due process limitation of a state's assumption of jurisdiction over non-resident corporations for non-forum state injuries is a two-pronged test. First, the obligation sued upon must arise out of the very activity supplying the contacts or ties with the forum state. Second, the non-resident corporation must be engaged in continuous and substantial activity in the forum state. *International Shoe Company* v. *Washington*, 326 U.S. 310; *Tauza* v. *Susquehanna Coal Company*, 220 N.Y. 259, 115 N.E. 195 (1917); *St. Louis Southwestern Railroad Company* v. *Alexander*, 227 U.S. 218 (1913); *Perkins* v. *Benguet Consolidated Mining Company*, 342 U.S. 437 (1952).

Anticipating the absence of jurisdiction in Mississippi, the respondent has on file a "protective" suit in the State of Louisiana. At the base of it, this case concerns a Louisiana automobile accident and litigation between a Delaware Corporation having its principal place of business in Louisiana, and a Louisiana conservator for a Mississippi plaintiff. Based upon tests of *International Shoe* and a factual analysis of the case, there is a strong viable question as to whether Mississippi's assumption of in personam jurisdiction over the petitioner was constitutionally correct. Likewise, that issue has been glossed over through the invocation of Mississippi's peculiar procedural rule.

CONCLUSION

For the aforestated reasons, the Petition for Certiorari should be granted in that the petitioner was unquestionably denied due process by the procedural "special appearance" rule utilized by the Mississippi Supreme Court. Alternatively, there was no in personam jurisdiction over the petitioner in the state courts of Mississippi.

Respectfully submitted,

ARROW FOOD DISTRIBUTORS, INC.
UPSHAW, SCHISSEL, DORIZAS & LADNER
by HEBER LADNER, JR.

APPENDIX

ARROW FOOD DISTRIBUTORS, INC.

v.

Lloyd F. LOVE, Conservator of the Estate of William F. Riley, Jr.

No. 50287.

Supreme Court of Mississippi.

July 12, 1978.

Rehearing Denied Aug. 23, 1978.

Conservator of estate of injured motorist brought action against owner of tractor trailer that collided with motorist's automobile. The Chancery Court, Adams County, Frederick C. Berger, Chancellor, entered judgment for plaintiff, and defendant appealed. The Supreme Court, Robertson, P.J., held that: (1) evidence sustained finding that nonresident defendant that owned tractor trailer involved in accident did substantial amount of business in state at time cause of action accrued, and Chancery Court had jurisdiction over such nonresident defendant; (2) decision of federal district court that action did not invoke federal jurisdiction precluded further litigation on such issue; (3) evidence sustained jury verdict awarding $248,920 to 23-year-old plaintiff; (4) defendant failed to preserve contention of error in connection with protective order covering plaintiff's medical records, and (5) chancellor did not err in excluding opinion testimony of accidentologist.

Affirmed.

1. Corporations (Key) 668(1)

Statute governing service of process when defendant is a nonresident doing business in state complements statute governing foreign corporations subject to suit in state in furthering state's avowed policy to open the door of state courts to foreign corporations found doing business in state to sue and be sued in state on all bona fide causes of action. Code 1972, §§ 13-3-57, 79-1-27.

2. Courts (Key) 12(5)

Evidence in action to recover for injuries sustained in motor vehicle collision sustained finding that nonresident defendant that owned tractor trailer involved in accident did substantial amount of business in state at time cause of action accrued, and thus chancery court had jurisdiction over such nonresident defendant. Code 1972, §§ 13-3-57, 79-1-27.

3. Appearance (Key) 22

By entering a general appearance, nonresident defendant waived any asserted defect in chancery court's jurisdiction over it.

4. Judgment (Key) 829(2)

Federal district court's decision that action arising out of motor vehicle collision did not invoke federal jurisdiction precluded further litigation of the issue of forum in which removed case was to be litigated.

5. Damages (Key) 132(3)

Evidence in action to recover for personal injuries sustained in motor vehicle collision sustained jury verdict awarding $248,920 to 23-year-old plaintiff motorist who

was totally and permanently disabled, who suffered brain contusion, basilar skull fracture, sheared teeth and cuts on the head requiring 175 stitches, who underwent a complete change of personality due to dead brain cells and formation of scar tissue, and who had been making $10,800 per year with a good chance of advancement at time of accident.

6. Appeal and Error (Key) 205

On appeal from judgment entered in action to recover for injuries sustained in motor vehicle collision, defendant failed to preserve its contention of error with respect to chancellor's protective order covering plaintiff's medical records, because such records were never introduced into evidence and were never offered into evidence.

7. Evidence (Key) 519

In action to recover for injuries sustained in motor vehicle collision, chancellor did not err in excluding opinion testimony of accidentologist, in view of fact that accidentologist's observations as to how jury should interpret photographs introduced into evidence invaded province of jury.

Upshaw, Dorizas & Ladner, Heber Ladner, Jr., Jackson, for appellant.

Daniel Coker, Horton, Bell & Dukes, Terry R. Levy, Joe H. Daniel, Jackson, Zuccaro, Riley, Pintard & Brown, William F. Riley, Sr., Natchez, for appellee.

Before ROBERTSON, SUGG and BROOM, JJ.

ROBERTSON, Presiding Justice, for the Court:

Arrow Food Distributors, Inc., a Delaware corporation with its headquarters in New Orleans, Louisiana, appeals

from a decree of the Chancery Court of Adams County, Mississippi, for $248,920, in favor of Lloyd F. Love, Conservator of the Estate of William F. Riley, Jr.

The injuries to Riley resulted from a head-on collision of Riley's Pinto automobile with a large refrigerated tractor-trailer unit owned by Arrow and driven by Henry D. Alexander. About 4:45 A.M., August 1, 1975, William F. Riley, Jr. was driving south on U. S. Highway 61 north of Baton Rouge, Louisiana. Riley was on his way back to work as a roustabout on an oil rig off of the Louisiana coast. It was raining rather heavily and foggy in low places along the highway. Henry Alexander was driving Arrow's refrigerated tractor-trailer unit north on U. S. Highway 61 at a speed of 45 to 50 miles per hour. He was en route to Natchez, Mississippi, to deliver refrigerated foods ordered by Mississippi customers of Arrow. Alexander testified that he thought he saw headlights in his lane. He blinked his lights and, according to Alexander, the headlights, instead of moving west, moved to the east side of the highway. Alexander continued:

"At this time I applied my brakes lightly, my truck went into a skid, and shortly after I went into a skid there was an impact.

Q All right. Now, as you approached that vehicle, tell the Court and Jury again what that vehicle did?

A It moved to the right shoulder.

Q What did you do at that time?

A At that time I looked and I saw that the left lane was available, there was no traffic coming, so I tried to move over to my left.

Q What were the weather conditions that day?

A It was raining.

Q Were there any other weather conditions that you took note of?

A It was slightly foggy in spots."

Louisiana Highway Patrolman Joe White testified that the refrigerated van turned over and the dual rear wheels came to rest on top of the Pinto automobile. Riley's Pinto was completely in the southbound lane. Arrow's truck was partially in the southbound lane, partially on the west shoulder and partially in the northbound lane. Riley remained unconscious in a Baton Rouge hospital for 24 hours. He suffered a brain contusion, basilar skull fracture, sheared teeth, various bruises and cuts on the head requiring 175 stitches, burns to his fingers and hand, and a compression fracture of the sixth cervical vertebra with a narrowing of the disc between the fifth and sixth vertebrae. The force of the impact bent the frame of the defendant's truck and totally demolished Riley's automobile.

Arrow assigned 24 errors but briefed only 6. In its brief, Arrow argues:

1. The Chancery Court of Adams County did not have jurisdiction;
2. The United States District Court for the Southern District of Mississippi did have jurisdiction even though, after a hearing, that Court had remanded the case to the Adams County Chancery Court;
3. The trial court erred in sustaining a motion *in limine* and entering a protective order covering Riley's medical records at Whitfield;
4. The court erred when it excluded the tetsimony of an expert "accidentologist"; and
5. The verdict was against the overwhelming weight of the evidence.

Nelson DeSoto, vice president of appellant, testified that Arrow had sold foodstuffs in Mississippi continuously since 1951. Sales in Mississippi averaged $2,000 to $3,000 a week. A salesman would come to Mississippi and solicit orders. The orders would be filled in Louisiana and shipped by truck to Mississippi purchasers. Sales in Mississippi of $104,000 to $156,000 annually, in our opinion, constitute a substantial amount of business. In April, 1976, $9,000 was owed Arrow by Mississippi purchasers. On June 23, 1976, approximately $3,500 was still owed Arrow by Mississippi purchasers, and two delinquent accounts had been placed in the hands of attorneys for collection. Arrow had used Mississippi's highways for 15 years in delivering foodstuffs sold to Mississippi customers, and now would use Mississippi's courts in collecting debts due it.

Suit was begun as an attachment in chancery. The defendants were Arrow Foods, a non-resident corporation, and four Mississippi debtors of Arrow. Process was served on the Secretary of State of Mississippi for Arrow. All four attachment defendants answered admitting that they owed Arrow. Appellant moved to transfer to the United States District Court for the Southern District of Mississippi on the ground of diversity of citizenship between Arrow and the ward, William F. Riley, Jr., who was a Natchez resident, even though his conservator, Lloyd F. Love, was a Louisiana resident. After a hearing, the United States District Court remanded the case to the Chancery Court of Adams County. The pleadings transferred to the chancery court included Arrow's Answer which asserted thirteen defenses.

Mississippi Code Annotated section 13-3-57 (1972) provides in part:

> "Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident of this state, or *who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi.* Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their, or its agent, servant or employee.
>
> . . .
>
> "*The doing of such business,* or the engaging in any such work or service in this state, or the making of such contract, or the committing of such tort in this state, *shall be deemed to be a signification of such nonresident's agreement that any process against it or its representative which is so served upon the secretary of state shall be of the same legal force and effect as if served on the nonresident at its principal place of business in the state or country where it is incorporated and according to the law of that state or country.*" (Emphasis added).

Arrow contends that section 13-3-57 does not apply because the collision took place in Louisiana and the cause of action accrued there. The appellee answers that not

only does section 13-3-57 apply but that Mississippi Code Annotated section 79-1-27 (1972) also applies. The appellee contends that section 79-1-27 complements 13-3-57 and that these sections must be read together and harmonized. Section 79-1-27 provides:

> "Any corporation claiming existence under the laws of any other state or of any country foreign to the United States, *found doing business in this state*, shall be subject to suit here to the same extent that corporations of this state are, *whether the cause of action accrued in this state or not.*" (Emphasis added).

In *Vicksburg S. & P. R. Co.* v. *Forcheimer*, 113 Miss. 531, 74 So. 418 (1917), in discussing section 79-1-27 (Chapter 123, Laws 1908), this Court said:

> "The policy of our state is to open the door of our courts to all foreign corporations desiring to sue on any proper cause of action, and to subject foreign corporations to suit here the same as individuals. This is the express declaration of our statute, ..." 113 Miss. at 537-38, 74 So. at 419.

[1] In our opinion section 13-3-57 and 79-1-27 must be read together, construed together and harmonized one with the other. When this is done and full meaning is given to the language used in each section, it is clear to us that 13-3-57 complements 79-1-27 in furthering the state's avowed policy as expressed in *Vicksburg S. & P. R. Co.* v. *Forcheimer, supra,* to "open the door" of our Mississippi courts to foreign corporations found doing business in this State to sue and be sued here on all bona fide causes of action.

[2] Besides being a bona fide attachment suit, the chancellor found that Arrow over the years had done

and was still doing a substantial amount of business in Mississippi at the time this cause of action accrued. We cannot say that the chancellor was wrong in his finding.

[3] We note that Arrow filed an Answer and asserted thirteen defenses in a full trial of this cause. By entering a general appearance, Arrow waived any asserted defect in the jurisdiction. *Maupin* v. *Dennis,* 252 Miss. 496, 175 So.2d 130 (1965); *Mladinich* v. *Kohn,* 250 Miss. 138, 164 So.2d 785 (1964).

In *McMillan* v. *Tate,* 260 So.2d 832 (Miss. 1972) this Court said:

> "While an individual or corporation may appear specially for the purpose of objecting to the jurisdiction of the court over his person, *he must do so before filing any other pleadings.*" 260 So.2d at 833. (Emphasis added).

There is no merit in this assignment of error.

[4] In its next assignment of error, Arrow attempts to relitigate the matter of federal court jurisdiction in a State court. This contention was long ago rejected by the Supreme Court of the United States in *Missouri R. R. Co.* v. *Fitzgerald,* 160 U.S. 556, 16 S.Ct. 389, 40 L.Ed. 536 [1896]. In *McLaughlin Bros.* v. *Hallowell,* 228 U.S. 278, 33 S.Ct. 465, 57 L.Ed. 835 (1912), the United States Supreme Court again answered this contention:

> "The supreme court of Nebraska rightly recognized the courts of the United States to be the exclusive judges of their own jurisdiction, . . . As, under the statute, a remanding order of the circuit court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on a writ of error to a state

court, the prohibition being that 'no appeal or writ of error from the decision of the circuit court, remanding such cause, shall be allowed.'" 227 U.S. at 286, 33 S.Ct. at 468, 57 L.Ed. at 839.

In *Rath Packing Co.* v. *Becker*, 530 F.2d 1295 (9th Cir. 1975) cert. granted 425 U.S. 933, 96 S.Ct. 1663, 48 L.Ed.2d 174 (1976), the Ninth Circuit, citing *Missouri R. R. Co.* v. *Fitzgerald, supra*, said:

> "*The decision of the district court* that the case does not invoke the federal jurisdiction and must be remanded *precludes further litigation of the issue of the forum in which the removed case is to be litigated.*" 530 F.2d at 1303. (Emphasis added).

[5] Appellant next contends that the verdict is against the overwhelming weight of the evidence.

Where the accident happened, Highway 61 is about 50 feet wide. There are two travel lanes, each approximately 12 feet wide, and beside each lane is an asphalt shoulder ten or twelve feet wide. Henry D. Alexander, the driver of appellant's tractor-trailer, was the only eyewitness able to testify. He testified that when he thought he saw Riley in his northbound lane he blinked his lights but Riley moved further to the east. Then Alexander braked lightly and attempted to move into Riley's southbound lane, but his truck "went into a skid and shortly after I went into a skid there was an impact."

The impact was entirely in Riley's southbound lane. When Trooper White arrived he found Riley's Pinto underneath the right rear dual wheels of the trailer which had turned over. Arrow's tractor-trailer stretched all the way from the west shoulder completely across the southbound lane and partially across the northbound lane. There

were two-inch-deep gouge marks two feet west of the center line which stretched north in the southbound lane for 40 feet to the point of impact. The physical facts fully support and justify the jury's verdict as to liability.

As to the jury verdict for $248,920 damages, the overwhelming testimony of the medical doctors who examined him was that 23-year-old Billy Riley was totally and permanently disabled. After carefully examining the photographs in the record showing the complete demolition of Riley's Pinto it is hard to comprehend how Riley is even alive today.

He suffered a brain contusion, basilar skull fracture, sheared teeth and cuts on the head requiring 175 stitches. The doctors attributed his complete change of personality (causing him to threaten to kill his wife and child, his parents and even himself) to dead brain cells and the formation of scar tissue as a result of the brain contusion and basilar skull fracture.

Riley was making $10,800 a year with a good chance of advancement. Under the facts of this case, we cannot say that the unanimous jury verdict is excessive and that the chancellor was in error in adopting the jury verdict as the judgment of the court.

[6] Even if the records on Riley at the Mississippi State Hospital at Whitfield were not privileged and were admissible in evidence, Arrow has not preserved this point because these records were never introduced into evidence, nor were they even offered into evidence. They are not, therefore, before this Court. We stated in *Willenbrock* v. *Brown*, 239 So.2d 922 (Miss. 1970):

> "It was the duty of the appellant to perfect the record on appeal and we have stated many times that we

will not consider anything on appeal that does not appear in the record." 239 So.2d at 925.

[7] There is no merit in the appellant's contention that the chancellor erred when he excluded the opinion testimony of accidentologist Alvin Doyle, Jr.

We specifically answered this contention in *Hagan Storm Fence Company* v. *Edwards,* 245 Miss. 487, 148 So.2d 693 (1963), when we said:

> "It should be observed that Mr. Doyle had no facts before him on which to reach his conclusions that the jury did not have. He testified from photographs that had been introduced in evidence, the location at which the two vehicles came to rest as necessarily related to him by witnesses, and testified as to the indicated speed of each automobile at the time of the accident, and of course he did not know the point of impact except from hearsay, and on the basis of his experience as hereinbefore set forth." 245 Miss. at 492, 148 So.2d at 695.

His observations as to how the jury should interpret the pictures introduced into evidence invaded the province of the jury and should not have been admitted.

Finding no reversible error, we are of the opinion that the decree of the chancery court, adopting the jury's verdict as its own, should be and is hereby affirmed.

AFFIRMED.

PATTERSON, C. J., SMITH, P. J., and SUGG, WALKER, BROOM, LEE, BOWLING and COFER, JJ., concur.

Supreme Court, U. S.
FILED
NOV 29 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No. 78-729

ARROW FOOD DISTRIBUTORS, INC.
Petitioner

vs.

LLOYD F. LOVE, CONSERVATOR OF THE ESTATE
OF WILLIAM F. RILEY, JR.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE
OF MISSISSIPPI

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Introduction 1

Questions Presented 2

Constitutional Provisions Involved 2

Statement of the Case 3

I. It Is Unnecessary and Improper for This Court to Consider Petitioner's Attack upon the State Attachment Statute, Since the State Court's Jurisdiction Rested upon Other Grounds 5

II. The Decision of the State Court Is Based upon Independent and Adequate State Grounds 7

III. The Finding by the State Court That the Non-Resident Petitioner Was Subject to Jurisdiction Under the State's "Long-Arm" Statute Did Not Violate Due Process and Was Based upon Substantial Evidence 12

Conclusion 18

TABLE OF AUTHORITIES

CASES

Brinkerhoff-Ferris Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) 8

Brown v. Massachusetts, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 552 (1892) 8

County of San Bernardino v. Southern Pac. R. R., 118 U.S. 417, 6 S.Ct. 1144, 30 L.Ed. 125 (1886) 6

Davis, Director General of Railroads, Etc. v. Wechsler, 263 U.S. 22, 44 S.Ct. 13, 68 L.Ed. 143 (1923) 10, 11

General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964) 18

Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 546, 13 L.Ed.2d 408 (1965) 8, 9

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) 13

Jones v. Andrews, 10 Wall 327, 19 L.Ed. 935 (1870) 9

Maupin v. Dennis, 252 Miss. 496, 175 So.2d 130 (1965) 8

McMillan v. Tate, 260 So.2d 832 (Miss. 1972) 8

Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964) 9

Murdoch v. City of Memphis, 20 Wall 599, 22 L.Ed. 429 (1875) 7

Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952) 13

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) 17, 18

Radio Station WON v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 209 (1945) 8

Richardson Machinery Co. v. Scott, 276 U.S. 128, 48 S.Ct. 264, 72 L.Ed. 497 (1928) 9, 10, 11

Vicksburg S & P. R. Co. v. Forcheimer, 113 Miss. 531, 74 So. 418 (1927) 15

Wilson v. Loew's, Inc., 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed. 519 (1958) 8

CONSTITUTIONAL PROVISIONS AND STATUTES

Mississippi Code Annotated (1972)
Section 13-3-57 16
Section 79-1-27 16

IN THE
SUPREME COURT OF THE UNITED STATES

NO. 78-729

ARROW FOOD DISTRIBUTORS, INC.
PETITIONER

vs.

LLOYD F. LOVE, CONSERVATOR
OF THE ESTATE OF
WILLIAM F. RILEY, JR.
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

The respondent, Lloyd Love, Conservator of the Estate of William F. Riley, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Mississippi Supreme Court's judgment and opinion in this case. That opinion is reported at 361 So.2d 324 (Miss. 1978) and is appended to the Petition for Writ of Certiorari. (A1-A12)

QUESTIONS PRESENTED

None of the questions as phrased in the Petition for Writ of Certiorari are dispositive of the matter.

CONSTITUTIONAL PROVISIONS INVOLVED

Since the case turns upon independent and adequate state grounds there are no constitutional provisions properly before this Court.

STATEMENT OF THE CASE

The statement of the case set out in the Petition fails to set out the following particulars material to the issue presented:

(1) The Conservator's ward, William F. Riley, Jr., was and is a citizen of Natchez, Adams County, Mississippi. On September 28, 1976, a judgment in the amount of $248,920.00 was entered on a jury verdict in the Conservator's favor to

compensate the ward for serious physical and psychological injuries caused when petitioner's truck collided with the ward's vehicle. To date the judgment has not been paid and this Court has twice denied petitioner's stay of execution.

(2) The trial judge after hearing testimony and the Mississippi Supreme Court upon review of the record found that petitioner, Arrow Food Distributors, Inc., a non-resident corporation, was "doing business" in Mississippi and subject to the state's long arm jurisdiction. The petitioner's delivery truck which collided with respondent's ward was en route to Mississippi to deliver food products to its long-standing Mississippi customers.

As to the amount of business the corporation was doing in the state, the Mississippi Supreme Court made the following findings:

Nelson Desoto, vice president of appellant, testified that Arrow had sold foodstuffs in Mississippi continuously since 1951. Sales in Mississippi averaged $2,000 to $3,000 a week. A salesman would come to Mississippi and solicit orders. The orders would be filled in Louisiana and shipped by truck to Mississippi purchasers. Sales in Mississippi of $104,000 to $156,000 annually, in our opinion, constitute a substantial amount of business. In April, 1976, $9,000 was owed Arrow by Mississippi purchasers. On June 23, 1976, approximately $3,500 was still owed Arrow by Mississippi purchasers, and two delinquent accounts had been placed in the hands of attorneys for collection. Arrow had used Mississippi's highways for 15 years in delivering foodstuffs sold to Mississippi customers, and now would use Mississippi's courts in collecting debts due it. (A6)

(3) After removing the case to federal court, petitioner filed a lengthy pleading raising as its first defense that no cause of action was stated, and then stated jurisdictional objections. After remand petitioner filed a second responsive pleading setting up as its first defense that there was no equity on the face of the bill. Prior to a hearing on petitioner's jurisdictional attacks, petitioner noticed five depositions which were taken shortly after the hearing, and propounded eighty-eight interrogatories going to the merits of the case.

(4) The Mississippi Supreme Court did not actually consider the constitutionality of the state attachment statute, finding that petitioner's "doing business" in the state and its filing of a general appearance were dispositive of the jurisdictional questions.

I. IT IS UNNECESSARY AND IMPROPER FOR THIS COURT

TO CONSIDER PETITIONER'S ATTACK UPON THE STATE ATTACHMENT STATUTE, SINCE THE STATE COURT'S JURISDICTION RESTED UPON OTHER GROUNDS.

It is clear from the state court's opinion, found as "Appendix A" to the petition, and from the record, that the state court's jurisdiction was based upon three separate grounds. It is unnecessary for respondent to argue the merits and demerits of the Mississippi attachment statute, since there are other adequate grounds upon which the decision must rest. It is a settled rule of appellate procedure that the Supreme Court will not rule upon the constitutionality of a state statute, unless the Court's decision must turn on the statute. County of San Bernardino v. Southern Pac. R. R., 118 U.S. 417, 6 S.Ct. 1144, 30 L.Ed. 125 (1886) (Field, J., concurring).

This case began as an attachment case, but petitioner was found to be "doing business" in the state and was properly served with process under the state's long arm statute. In addition, petitioner's waiver of alleged jurisdictional irregularities mooted all possible ills.

II. THE DECISION OF THE STATE COURT IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has long held that it will not review state court judgments which are based upon independent and adequate state grounds. Murdoch v. City of Memphis, 20 Wall 599, 22 L.Ed. 429 (1875). Petitioner's assertion that this rule is limited to substantive grounds is not correct. The Supreme Court has either explicitly or by implication found independent and adequate state grounds for a state court's disposition

of a case on procedural grounds in many cases. E.g., Wilson v. Loew's, Inc., 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed. 519 (1958); Radio Station WON v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 209 (1945); Brown v. Massachusetts, 144 U.S. 573, 12 S.Ct. 757, 36 L.Ed. 552 (1892). Furthermore, the only possible qualification of the rule when used in determinations of procedural matters is that the procedural rule serves a legitimate state interest. Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 546, 13 L.Ed.2d 408 (1965). In the case at bar, unlike Brinkerhoff-Ferris Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), Mississippi's rule as to a party's waiver of jurisdictional defects by filing a general appearance was clearly engraved in state law and consistently applied. See McMillan v. Tate, 260 So.2d 832 (Miss. 1972); Maupin v. Dennis, 252 Miss. 496,

175 So.2d 130 (1965); Mladinich v. Kohn, 250 Miss. 138, 164 So.2d 785 (1964). Also, unlike counsel in Henry v. Mississippi, supra, there is no dispute that petitioner's counsel was and is a member of the Mississippi bar and should have been aware of Mississippi law.

The fact that one can waive alleged jurisdictional defects by not first clearly raising the jurisdiction question is a long-standing constitutional principle. Richardson Machinery Co. v. Scott, 276 U.S. 128, 48 S.Ct. 264, 72 L.Ed. 497 (1928); Jones v. Andrews, 10 Wall 327, 19 L.Ed 935 (1870). Scott, supra, has facts very similar to the instant case and is controlling.

In Scott, supra, after a default judgment had been rendered against petitioner corporation, it filed a special appearance in state court and then removed the case to federal court on the ground of diversity of

citizenship. The case was remanded to state court, where petitioner again filed a petition to vacate the judgment on both jurisdictional and nonjurisdictional grounds. In ruling that the judgment against the petitioners rested on an adequate state (non-federal) ground, this Court said:

> Since the founding of the state, it has been the settled law of Oklahoma that where a person against whom a judgment is rendered files a petition to vacate the judgment upon the ground that the court had no jurisdiction of the defendant, and the petition is based also on nonjurisdictional grounds, . . . the filing of the petition operates as a voluntary general appearance, with the same effect as if such appearance had been made at the trial. 276 U.S. 128, 133

Petitioner's reliance upon the case of Davis, Director General of Railroads, Etc. v. Wechsler, 263 U.S. 22, 44 S.Ct. 13, 68

L.Ed. 143 (1923) is misplaced. In Davis the state court applied federal law, not a state procedural rule. Also, respondent has never claimed that petitioner's removal of the case to federal court was the act constituting a general appearance. Petitioner's further conduct, which conduct was in the record before the state court judges, is what constituted a general appearance. In petitioner's answer filed in federal court, it raised as its first defense that no cause of action was stated, continued to contest jurisdiction, and then answered on the merits. After the case was remanded to state court, petitioner voluntarily filed another similar pleading in which its first defense was that there was no equity on the face of the complaint. Although filing a "special appearance" may not be required by the federal rules, petitioner had a second chance to plead according to estab-

lished state practice and did not. Furthermore, almost two weeks prior to arguing the alleged jurisdictional defects, petitioner noticed five depositions and propounded eighty-eight interrogatories going to the merits of the case.

By its pleading and conduct, petitioner entered a general appearance under Mississippi law, much the same as the petitioner in Scott, supra. Mississippi's application of its procedural rule was fair and sound. The rule serves the legitimate state interest of requiring a defendant, at the earliest possible time, to clearly demonstrate to the Court and to the plaintiff that he intends to contest jurisdiction. This procedure works for an efficient use of the Court's time and the time and resources of the parties.

III. THE FINDING BY THE STATE COURT THAT THE NON-RESIDENT PETITIONER

WAS SUBJECT TO JURISDICTION UNDER THE STATE'S "LONG-ARM" STATUTE DID NOT VIOLATE DUE PROCESS AND WAS BASED UPON SUBSTANTIAL EVIDENCE.

Petitioner's construction of International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) and Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485 (1952), is too narrow. These cases clearly hold that a non-resident may be brought to justice in a state where it has sufficient contacts, even if the cause of action did not arise in that state. Furthermore, in the instant case the accident had a real connection to the forum state: (1) petitioner's delivery truck was on its way to Mississippi to deliver foodstuffs previously ordered by long-standing Mississippi customers and (2) the injured party was and is a

resident of Mississippi. Petitioner has consistently attempted to play down the fact that it had substantial and systematic contact with Mississippi for over fifteen years. The Mississippi Supreme Court found,

> Nelson Desoto, vice president of appellant, testified that Arrow had sold foodstuffs in Mississippi continuously since 1951. Sales in Mississippi averaged $2,000 to $3,000 a week. A salesman would come to Mississippi and solicit orders. The orders would be filled in Louisiana and shipped by truck to Mississippi purchasers. Sales in Mississippi of $104,000 to $156,000 annually, in our opinion, constitute a substantial amount of business. In April, 1976, $9,000 was owed Arrow by Mississippi purchasers. On June 23, 1976, approximately $3,500 was still owed Arrow by Mississippi purchasers, and two delinquent accounts had been placed in the hands of attorneys for collection. Arrow had used Mississippi's highways for 15 years in delivering

> foodstuffs sold to Mississippi customers, and now would use Mississippi's courts in collecting debts due it. (A6)

* * *

> . . . [T]he chancellor found that Arrow over the years had done and was still doing a substantial amount of business in Mississippi at the time this cause of action accrued. We cannot say that the chancellor was wrong in his finding. (A8-9)

Petitioner has not contested these facts but would only try to characterize them differently. However, they undoubtedly show that petitioner's contacts with the state were more than sufficient to be an independent basis of jurisdiction.

Mississippi has clearly determined to open its courts to the fullest extent allowable under the U.S. Constitution. See Vicksburg S. & P. R. Co. v. Forcheimer, 113 Miss. 531, 74 So. 418 (1927). Furthermore, Miss.

Code Ann. (1972) §79-1-27 clearly allows jurisdiction over the petitioner in the instant case. This section reads as follows:

> Any corporation claiming existence under the laws of any other state or of any country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not. (Emphasis added).

Miss. Code Ann. (1972) §13-3-57, Mississippi's "long-arm statute", allows process for a non-resident defendant who commits a tort in the state or who is doing business in the state to be served with process through the Mississippi Secretary of State. In its finding that the Mississippi Court had proper jurisdiction over petitioner, the Mississippi Supreme Court stated:

> In our opinion section 13-3-57 and 79-1-27 must be read together, construed together and harmonized one with the other. When this is done and full meaning is given to the language used in each section, it is clear to us that 13-3-57 complements 79-1-27 in furthering the state's avowed policy as expressed in Vicksburg S. & P. R. Co. v. Forcheimer, supra, to "open the door" of our Mississippi courts to foreign corporations found doing business in this State to sue and be sued here on all bona fide causes of action. (A8)

Respondent recognizes that this Court has the power to review the facts in determining if a federal right has been violated. In the instant case, however, such a review would be unnecessary and unfruitful. The facts of petitioner's contacts with Mississippi are not disputed and are supported by substantial evidence in the record. This Court has indicated that it will give great, if not controlling, weight to the state court's findings of fact and uphold a decision based upon substantial evidence. Pickering v. Board of Education, 391 U.S.

563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964).

The Supreme Court of the State of Mississippi took an in-depth look at the jurisdictional facts. The Court's decision is soundly based upon the law and the facts. This Court need only to summarily affirm that Court's determination.

CONCLUSION

For the reasons stated above, Respondent submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CONSERVATOR OF THE
ESTATE OF WILLIAM F.
RILEY, JR.

JOE H. DANIEL,
COUNSEL FOR RESPONDENT

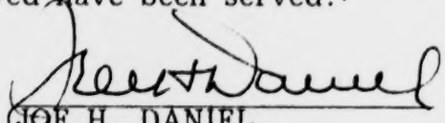
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CERTIFICATE OF SERVICE

I hereby certify that on this the 28th day of November, 1978, three copies of Respondent's Brief in Opposition were mailed, postage prepaid, to Heber Ladner, Jr., Esq., a member of the firm of Upshaw, Schissel, Dorizas and Ladner, 1646 Capital Towers, Jackson, Mississippi 39201, attorney of record for the petitioner. I further certify that all parties required to be served have been served.



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